WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

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OFFICE WEST VIRGINIA SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Insurance Commissioner (Workers' Compensation Rules) TITLE NUMBER: 85

CITE AUTHORITY WV Code §§23-2-9(e); 23-2C-2(p); 23-2C-2(q); 23-2C-22; 33-2-10(b); and 33-2-21(a)

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

WV Code §§23-2C-5(c)(2)

AMENDMENT TO AN EXISTING RULE: YES X NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 19

TITLE OF RULE BEING AMENDED: Self Insurance Risk Pools

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS November 21, 2008

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

$7.00

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 19
SELF INSURANCE RISK POOLS

Section

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 19
SELF INSURANCE RISK POOLS

§85-19-1. General.

1.1. Scope. -- This exempt legislative rule provides for the creation of risk pools for the benefit of self-insured employers to secure the payment of obligations of self-insured employers.

1.2. Authority. -- W. Va. Code §§23-2-9(e), 23-2C-2(p), 23-2C-2(q), 23-2C-22, 33-2-10(b), and 33-2-21(a). Pursuant to W. Va. Code §23-2C-5(c)(2), workers' compensation rules proposed by the Commissioner and approved by the Industrial Council are not subject to legislative approval as would otherwise be required under W. Va. Code §§29A-3-9 through 29A-3-16, inclusive. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- October 22, 2008.

1.4. Effective Date. -- November 21, 2008.

§85-19-2. Purpose of Rule.

This rule provides for the continued maintenance and funding of two risk pools to secure the obligations of self-insured employers.

§85-19-3. Definitions.

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

3.1. "Default" means the failure by a self-insured employer to make a payment (including but not limited to payment of a claim, regulatory surcharge, debt reduction assessment or guaranty pool assessment), maintain required surety pursuant to the provisions of W. Va. Code St. R. §85-18-1 et seq. and this rule, or file a report due by it under the provisions of chapter twenty-three of the West Virginia Code or the rules promulgated thereunder within the time period specified by a notice regarding such failure.

3.2. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.

3.3. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which

includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

3.4. "Guaranty Pool", as the term is used in this rule means the Self-insured employer guaranty risk pool as established by W. Va. Code §§23-2-9(e) and 23-2C-2(p).

3.5. "Industrial Council" means the Industrial Council created within the office of the Insurance Commissioner pursuant to W. Va. Code §23-2C-5.

3.6. "Commissioner" means the Insurance Commissioner of West Virginia.

3.7. "Security Pool", as the term is used in this rule means the Self-insured employer security risk pool as established by W. Va. Code §§23-2-9(e) and 23-2C-2(q).

3.8. "Self-insurer" and "self-insured employer" mean employers who have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.9. "Insured Employer" means an employer who obtains coverage under any of the workers' compensation insurance plans offered by an insurer licensed by the Commissioner to provide such coverage in this State.

§85-19-4. Self Insurance Pools; Establishment; Application of Funds.

4.1. The Commissioner shall maintain the Self-insured Employer Security Pool established pursuant to W. Va. Code §§23-2-9(e) and 23-2C-2(q) to make payments for bankrupt and default self-insured employers for claims with dates of injury prior to July 1, 2004.

a. The Commissioner shall segregate all contributions to the Security Pool, including all investment income earned from Security Pool proceeds.

b. The Commissioner shall not expend proceeds from the Security Pool corpus or its earnings for any other purposes than for obligations of the security pool.

4.2. The Commissioner shall maintain the Self-insured Employer Guaranty Pool established pursuant to W. Va. Code §§23-2-9(e) and 23-2C-2(p) to make payments for bankrupt and default self-insured employers for claims with dates of injury on or after July 1, 2004.

a. The Commissioner shall segregate all contributions to the Guaranty Pool, including all investment income earned from Guaranty Pool proceeds.

b. The Commissioner shall not expend proceeds from the Guaranty Pool corpus

or its earnings for any other purposes than for obligations of the Guaranty Pool.

§85-19-5. Participation.

5.1. All self-insured employers, whether active or inactive, which have any claims arising during the period of self-insurance and which are open or subject to being re-opened shall participate in the Security Pool.

5.2. All active self-insured employers shall participate in the Guaranty Pool. Active self-insured employers that become inactive on or after July 1, 2004, shall be required to participate in the Guaranty Pool under the provisions of section 10. of this rule.

5.3. Former self-insured employers who have voluntarily bought out their liability prior to December 31, 2005, or have entered into an agreement for an involuntary buy out are not required to participate in either the security or guaranty pools.

§85-19-6. Surety Requirements.

6.1. All employers who participate in the Security Pool are required to fully secure their claims liabilities for all claims with dates of injury prior to July 1, 2004.

a. All employers who are fully secured for their claims liabilities as of the effective date of this rule shall maintain and increase their security as necessary to remain fully secured for their claims liabilities.

b. The failure by an employer to fully secure and maintain security on their claims liabilities in accordance with this rule may result in revocation of self-insurance status pursuant to the provisions of W. Va. Code St. R. §85-18-1 et seq. An employer who receives a notification of a recommendation by the Commissioner of revocation of self-insured status for failure to fully secure or maintain security on their claims liability may file a petition with the Industrial Council to be granted a six (6) month grace period to obtain security.

1. The employer shall file its petition for grace period with the Commissioner who will distribute the petition to the Industrial Council.

2. The Industrial Council shall consider the petition for grace period at such time as is convenient to the Industrial Council. The Industrial Council shall consider the petition in an executive session. The Industrial Council may consider the written petition only or request the employer, the Commissioner or both to make an oral presentation. The Industrial Council shall make any decision regarding the petition for grace period in an open meeting.

3. The Industrial Council shall only grant a petition for grace period upon a unanimous vote of the Industrial Council.

4. An employer may only be granted one grace period.

6.2. The Commissioner shall perform an annual surety review based upon the Commissioner's actuarial calculations to determine the required surety level for periods prior to July 1, 2004. Existing surety using old bond language will be credited to the employer at the estimated actual value of the bond as determined by the Commissioner.

6.3. Self insured employers shall not be required to provide surety, other than through Guaranty Pool assessments, for liabilities attributable to claims with dates of injury or last exposure on or after July 1, 2004. The Commissioner may require additional surety for claims with dates of injury on or after July 1, 2004, if it is determined that an employer's financial condition has deteriorated compared to the previous year's financial analysis by the Commissioner. The employer's financial condition will be analyzed using objective benchmarks to determine a deteriorating financial condition as provided in W. Va. Code St. R. §85-18-1 et seq.

§85-19-7. Security Pool Funding.

7.1. The Security Pool shall be funded by the following sources:

a. Proceeds received from the draw-down on surety documents in the event of a self-insured employer's default;

b. All graduated premium tax payments made by participating self-insured employers for periods through the quarter ending June 30, 2004;

c. Assessments to fund the Security Pool pursuant to W. Va. Code §23-2-9(e); and

d. Proceeds received from any alternative funds identified and made available through legislative enactment.

7.2. Should the proceeds identified in subsection 7.1. of this section be inadequate to fully satisfy the obligations of the Security Pool, the Commissioner and the Industrial Council shall identify and pursue such alternative funding as shall be deemed necessary.

§85-19-8. Security Pool Assessments Pursuant to W. Va. Code §23-2-9(e).

Beginning January 1, 2006, Security Pool assessments to self-insured employers shall be made as follows:

8.1. The Commissioner shall determine the projected claims payments to be made in the fiscal year.

8.2. The Commissioner shall determine the amount necessary to fund the Security Pool through assessments.

8.3. The Commissioner shall determine the methodology employed to allocate to each

self-insured employer, based upon the self-insured employer's claims reserves and financial strength, a fair and equitable portion of the projected claims payments.

8.4. In accordance with the methodology employed, the Commissioner shall determine the amount of each Security Pool assessment.

8.5. Notification. The Commissioner shall notify every employer who is assessed under this provision the amount of the assessment and the methodology employed to determine the assessment. The Commissioner shall provide notice to each affected employer at least sixty (60) days prior to the period for which the assessment is applicable.

8.6. Payments required under this provision shall be pro-rated and made on a quarterly basis.

§85-19-9. Guaranty Pool Funding.

9.1. Beginning July 1, 2006, and in order to fund the Guaranty Pool, the Commissioner shall, except with respect to those self-insured employers and former self-insured employers required to make payments in accordance with subdivision b. of this subsection and section 10. of this rule, respectively, assess self-insured employers, as follows:

a. The annual assessment shall be equal to two percent (2%) of the self-insured employer's preceding fiscal year's annual claims indemnity payments [excluding payments to settle claims on a full and final basis] or a minimum of five thousand dollars ($5,000), whichever is greater. For example, a self-insured employer has paid one million dollars ($1,000,000.00) in indemnity payments in the preceding fiscal year. Of the one million dollars ($1,000,000.00), two hundred thousand dollars ($200,000.00) has been paid to settle claims on a full and final basis. The self-insured employer would be assessed two percent (2%) of eight hundred thousand dollars ($800,000.00), which yields sixteen thousand dollars ($16,000.00) as an assessment to the self-insured employer; and

b. Any employer who becomes self-insured on or after July 1, 2004, will be assessed an amount equal to five percent (5%) of the preceding year's premium, or a minimum of five thousand dollars ($5,000), whichever is greater, for a period of 3 years, beginning with the quarter in which self-insured status was made effective and regardless of whether such employer becomes an insured employer within such 3-year period: Thereafter, assessments shall be made in accordance with the same methodology utilized for other self-insured employers, as set forth in subdivision a. of this subsection. An employer's liability for the assessments imposed pursuant to this subsection is not subject to suspension under subsection 9.2. of this section.

c. Payments made under this section and section 10. of this rule shall be pro-rated and made on a quarterly basis.

9.2. Whenever it is determined by the Commissioner that the Guaranty Pool contains more than the sum necessary to maintain the solvency of the Pool, the Commissioner shall

suspend the obligation of self-insured employers to pay the assessment under subdivision a., subsection 9.1. of this section and of any former self-insured employer to pay the assessment under section 10. of this rule: *Provided*, That as of July 1, 2006, ten million dollars ($10,000,000) is deemed to be an adequate level of funding to maintain the solvency of the Guaranty Pool.

9.3. The Commissioner shall propose different assessment methodologies and/or a different level of minimum funding of the Pool whenever he or she determines that such a change or changes are necessary to maintain the solvency of the Pool: *Provided*, That any changes to the assessment methodologies, as prescribed in subdivision a. and/or b., subsection 9.1. of this section, or to the level of funding deemed necessary to maintain solvency of the Pool, as prescribed in subsection 9.2. of this section, shall be made by amendment to this rule.

§85-19-10. Converting to Insured Employer Status or Becoming Inactive.

On or after July 1, 2004, any active self-insured employer who: (i) becomes an insured employer or who, either voluntarily or involuntarily, has its self-insured status terminated; and (ii) did not enter into a voluntary buy out for its liability prior to December 31, 2005, or enter into an agreement for an involuntary buy out, shall maintain surety in an amount sufficient to cover its liabilities during its period of self-insurance consistent with this rule and W. Va. Code St. R. §85-18-1 et seq.; any such employer shall also be assessed Security Pool and Guaranty Pool assessments for a period of ten (10) years from the termination of self-insured status: *Provided*, That in these circumstances, Guaranty Pool assessments for each year shall be in the amount of five percent (5%) of the prior year's indemnity payments or five thousand dollars ($5,000.00), whichever is greater; *Provided, further*, That such assessments are subject to suspension as provided in subsection 9.2. of this rule. This provision is not to be construed as excusing any obligation of a terminated self-insured employer imposed by chapter twenty-three of the West Virginia Code or the rules promulgated thereunder.

INSURANCE COMMISSIONER RESPONSES TO STAKEHOLDER AND PUBLIC COMMENTS RECEIVED ON W. VA. CODE ST. R. § 85-19-1 ET SEQ.

Introduction

Below is the written response of the Insurance Commissioner of West Virginia to the stakeholder and public comments received in regard to the new Title 85 Rule, W. Va. Code St. R. § 85-19-1 et seq. ("Rule 19" - Self-Insurance Risk Pools), which was filed with the West Virginia Secretary of State for public comment on 08/12/2008. This response is itemized by topic, and addresses all of the comments received by the public at the 09/11/2008 Industrial Council meeting as well as other selected substantive written comments received by stakeholders.

Issues Relevant to Title 85, Series 18

There were a number of comments which were relevant in whole or in part to Title 85, Series 18 ("Rule 18"), the primary Title 85 Rule pertaining to the regulation of self-insured employers. These issues include the form and type of security which can be posted, consideration and treatment of excess insurance in place, the annual review process and model used to review self-insured employers and the ability for a self-insured employer to enter into a loss-portfolio transfer for its risk. All of these issues either are solely relevant to Rule 18, or are relevant to both Rule 18 and this Rule, but would require amendments to Rule 18 before corresponding amendments could be made to this Rule. As such, the Insurance Commissioner will take into consideration the comments for future consideration when Rule 18 is open for amendments again. However, at this time, the Commissioner cannot make changes to this Rule which belong in Rule 18, or would be inconsistent with Rule 18 absent corresponding changes to Rule 18.

Definition of "Default"

There were several comments made regarding the definition of "default" in subsection 3.1. of the Rule. First, it was suggested that this definition should not be in the Rule at all, because self-insured employers are not subject to "employer default" in a similar manner to other employers.

The Commissioner understands that self-insured employers are concerned about being subject to the same sanctions for being in "default" as regular employers. However, in the context this definition is used in this Rule, it does not subject self-insured employers to these same sanctions. Rather, the term "default" in Rule 19 is simply a term used to describe a self-insured employer who is failing to meet its statutory obligations, so that the term can be used later in the Rule to describe obligations of the self-insured risk pools in scenarios where a self-insured employer has failed to meet its obligations. In other words, the definition of "default" in this Rule is significantly narrower than, for example, the definition of "employer default" used in other areas of the workers' compensation code or rules. Therefore, the Commissioner does not see the need to strike this definition.

It was also commented that the term "adequate" should be stricken from the definition regarding a self-insured employer being in default due to failure to post security. The Commissioner agrees that this term is unnecessary and could cause confusion. This Rule and Rule 18 clearly state the security requirements for self-insured employers, thus the term "adequate" is not necessary. Therefore, this word has been stricken and replaced with appropriate language directing the reader to other provisions of this Rule and Rule 18 setting forth the security requirements for self-insured employers.

Security Pool Assessments

A comment was made that the advance notice requirement for Security Risk Pool assessments be extended from thirty (30) days to sixty (60) days. The Insurance Commissioner agrees, and has amended this Rule to reflect the same.

It was also commented that the provision in subsection 7.2. of the Rule which provides a stopgap measure permitting the Insurance Commissioner and Industrial Council to indentify and pursue "alternative funding" for the security pool as deemed necessary should be amended to clarify under no circumstances would insurers be identified as such an "alternative source" of funding. While the Commissioner understands the concern, this is a stopgap measure in place that will likely never be put to use, absent some extremely rare circumstances. Moreover, certainly if this provision were ever used, there would be ample opportunity for discussion and opportunity to be heard before the selection of any source for alternative funding was identified and procured. Therefore, the Commissioner sees no need to amend this language at this time.

Finally, there was comment made that there should be a provision in the Rule expressly stating that the Commissioner cannot make assessments under the security or guaranty pool until all other sources had been exhausted. While the Commissioner does not want to place language in the Rule limiting in all situations the Commissioner's ability to make assessments for the self-insured pool until all other sources are exhausted, the Commissioner notes that the agency's general practice upon default of a self-insured employer is to pursue all other sources of funding related specifically to the defaulting employer (such as security, excess insurance, etc.) before pursuing assessments against the self-insured community at large.

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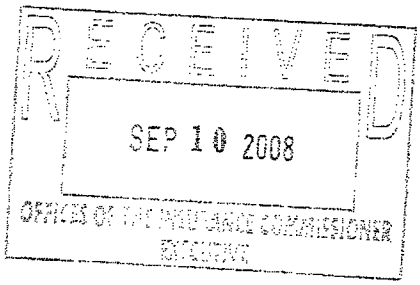
September 10, 2008



Jane L. Cline, Commissioner
West Virginia Division of Insurance
1124 Smith Street
P. O. Box 50545
Charleston, West Virginia 25305

Re: Comments on Workers Compensation Rules; Title 85, Series 19, 31

Dear Commissioner Cline:

These comments are submitted on behalf of the American Insurance Association (AIA), a national trade association representing property and casualty insurers. AIA members write a major share of property and casualty insurance, including workers' compensation insurance throughout the United States.

SERIES 19 – SELF INSURANCE RISK POOLS

Section 85-19-7 – Security Pool Funding

Subsection 7.2 provides that the Insurance Commissioner and Industrial Council shall identify and pursue "such alternative funding as shall be deemed necessary" in the event the proceeds identified under subsection 7.1 are inadequate to fully satisfy the obligations of the Security Pool.

We believe this extremely vague language must be modified to provide that insurers and/or insured employers shall not, under any circumstances, be considered sources of "alternative funding," since there is no reasonable justification for requiring these entities to pay for the insolvencies of self-insured employers.

SERIES 31 – PROFESSIONAL EMPLOYER ORGANIZATIONS

Section 85-31-7 – Notice of Coverage and Cancellation

Subsection 7.4 provides that "notice of cancellation of coverage to any client employer *for any reason* (emphasis added) shall not be effective without thirty (30) days advance written notice."

However, Section 23-2C-15(e) of the West Virginia Code provides that "cancellation of the policy by the carrier *for failure of consideration to be paid by the policyholder* (emphasis added) or for refusal to comply with a premium audit is effective after ten days advance written notice of cancellation to the policyholder."

Accordingly, we believe the rule must be amended to conform to the statutory authority.

Respectfully submitted
on behalf of American Insurance Association

By: T. Randolph Cox, II
T. Randolph Cox, Retained Counsel

TRC/lb;1148668

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September 11, 2008

Mary Jane Pickens, General Counsel
West Virginia Office of the Insurance Commissioner
1124 Smith Street
P. O. Box 50540
Charleston, WV 25305-0540

Re: 85 C.S.R. Series19

Dear Ms. Pickens:

Enclosed are comments from the West Virginia Chamber of Commerce to 85 C.S.R. Series 19, Self Insurance Risk Pools.

The Chamber thanks the Commissioner for her consideration of these comments.

Very truly yours

Henry C. Bowen
Chair, Workers Compensation Committee

HCB/hkj
Enclosure

CH.4983256

Section 3.1 Comment:

The revised definition of "default" adds the failure to maintain adequate security as an event of default that would trigger payments from the security and guarantee pools. However, this definition fails to take into account situations where a self-insured employer may not have adequate security but yet continues to make all required benefit claim payments.

Section 6.3.a Comment:

This section should be amended after the first sentence, as follows:

"Provided, that the amount of such additional surety shall be determined after application of any excess surety or insurance which was posted or provided by the employer."

Section 10 Comment:

This section should be amended beginning on line three (3) as follows:

"(ii) did not enter into a voluntary buy-out for its liability prior to December 31, 2005, (iii) did not enter into an agreement for an involuntary buy-out, or (iiii) did not enter into an agreement for a transfer of liability to an approved insurance carrier, ..."

General Comments:

- This rule needs to be amended to specify the priority of the draw-down of funds and/or surety in the event of a default before claims are paid from either the security or the guarantee pools, including a requirement that funds available from any excess coverage be obtained and applied to the amounts due.

- This rule should also be amended to permit the use of an approved loss portfolio transfer of liability to an insurance carrier, as an option in a situation involving an involuntary buy-out.

West Virginia Self-Insurers Association
Post Office Box 1573
Charleston, West Virginia 25326
Tax ID# 55-0654337

West Virginia Self-Insurers Association
Public Comment on Rule 85 C.S.R. §19
Public Hearing September 11, 2008

Below is a summary of the Commissioner's proposed changes to Rule 19 pertaining to self-insurance risk pools and comments from the West Virginia Self-Insurers Association (hereafter "WVSIA").

§85 C.S.R. Section 19-3 Definitions

Section 3.1 (p.1)

Comment

WVSIA objects to the definition of this section. In the long history of workers' compensation, self-insurers have never been subjected to default if there was a dispute over the adequacy of surety. Certainly a self-insurer's failure to maintain security as required can result in the Commissioner's recommendation that the Industrial Council revoke that employer's privilege of self-insurance. However, default carries with it severe legal implications. There is no immunity from civil suit during the period of this default; any injured employee may take benefits under the workers' compensation law and sue civilly for any injury negligently caused by the employer. The employer is strict statutorily of any affirmative defenses to such a lawsuit. There appears to be no need to expand the definition of default. Finally, the term "adequate" is too subjective and raises due process implications.

§85 C.S.R. Section 19-4 Self-Insurance Pools; Establishment; Application Funds

Section 4.1.b.

Comment

WVSIA recommends that this section be amended to reflect that in the event that there is a default and the defaulting self-insurer has security instruments that are not tied to specific dates of occurrence that any excess of proceeds received from a draw down on that security may be used to satisfy any of that self-insurer's default obligations in the guaranty pool.

85 C.S.R. Section 19-8 Security Pool Assessments Pursuant to W. Va. Code §23-2-9 (i)(e)

Section 8.5.

Comment

WVSIA recommends that the employer be given at least sixty (60) days notice prior to the assessments for which an assessment is applicable.

85 C.S.R. Section 19-9.9 Guaranty Pool Funding

Section 9.1.c.

Comment

WVSIA recommends that a new Section "c" be redesignated as Section d. The new sub-section "c" would reflect the following:

"Guaranty Pool" proceeds shall include proceeds received from a draw down on surety documents in claims against excess insurance, all of which must be asserted before self-insurers may be assessed for payment of a bankrupt defaulted self-insurer's obligations.

General Comments

The rule should insure that any excess proceeds received from a draw down on surety documents which may exceed security fund obligations and which are not by the terms of the security instruments tied to specific dates, any excess of proceeds may be applied for obligations occurring on or after July 1, 2004. Additionally, WVSIA feels that it is necessary for the security rule to reflect clearly that in the event that there is a guaranty fund obligation arising from a bankrupt default of a self-insurer, that the agency will turn against all surety instruments prior to assessing self-insurers or spending cash in the guaranty pool.

85 C.S.R. Section 19-10 Converting to Insured Employer Status or Becoming Inactive

Comment

WVSIA recommends that an additional sentence be added in this Section 10 reflecting the Commissioner's authority to approve and recommend that the Industrial Council approve a self-insurer's loss portfolio transfer to an insurance carrier meeting criteria established by the Commissioner.

WVSIA thanks the Industrial Council for its consideration of these comments.

PUBLIC HEARING

SEPTEMBER 11, 2008

OFFICES OF THE WEST VIRGINIA INSURANCE COMMISSIONER
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

TITLE 85, SERIES 19
"SELF INSURANCE RISK POOLS"

Transcript of the Public Hearing held on Thursday, September 11, 2008, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Charles Bayless, Chairman
Bill Dean
Kent Hartsog
Dan Marshall
Walter Pellish (via telephone)

Chairman Bayless: Does the staff have anything they would like add?

Mary Jane Pickens (General Counsel OIC): No.

Ryan Sims (Associate Counsel, OIC): Not at this time.

Chairman Bayless: Does any member of the Council have anything they would like to comment on? Does any member of the public have anything you would like to say?

Henry Bowen (West Virginia Self-Insurers Association): Thank you, Mr. Chairman. My name is Henry Bowen and a member of Steptoe & Johnson in its Charleston, West Virginia, office. I am here today on behalf of the West Virginia Self-Insurers Association for whom I serve as the Executive Secretary.

We have presented Ms. Pickens with written comments that I know you will receive later before you are asked to vote on this rule next month. I wanted to take just a few minutes of your time this afternoon to discuss with you why this rule is in front of you and what some of our Association members' concerns are about it.

The interplay of this rule and Rule 18, which has been already addressed by you again this summer, causes some concerns. And hopefully if there is an opportunity for subsequent dialogue, we would be happy to have representative members of the Association engage in that. I know you get challenged hearing lawyers all the time.

This agency has a tremendous comfort level with insurance. . .go figure. It's the Offices of the West Virginia Insurance Commissioner, and it has done an exceptionally fine job from anybody's perspective in being a transparent regulator of the insurance industry. As we all know, historically a number of people came to this agency from the former Workers' Compensation Commission that terminated in December 2005. I don't think it's unfair to say that perhaps some among this agency continue to have concerns about self-insurance and have difficulty moving away from some of the practices that have been utilized in evaluating self-insurance issues.

Let me say very clearly that the Legislature made a determination a number of years ago when we had a monopoly workers' compensation system that it was going to authorize self-insurance. Virtually all jurisdictions allow self-insurance, but not every state. The Legislature is free to change that authorization if it chooses at any time. It is a legally recognized privilege to direct pay benefits. It really doesn't serve much purpose to go through some of the past. I'm frequently reminded by some here at the Commissioner's offices that part of the problem is that we won't let go of the past.

We have a number of concerns that we have addressed in our brief [written] comments, and one of them is a historical concern. This is the second time since your Council was statutorily created that Rule 19 has been in front of you. The first time was in January of 2007. At that time the Commissioner recommended a reduction in the Guaranty Fund corpus and that was an ultimate benefit that was very significant to self-insurers as it lead to a cost reduction in their cost of doing business in West Virginia. And, again, other than the five municipalities that are authorized to self-insured, we're talking about large manufacturers, large utilities, large coal companies, large hospitals, large retailers; some of whom are now the largest employers in our state. Long ago we've seen manufacturing shrink away in terms of the days of Weirton Steel's 8,800 employees, and now we only have one mega employer in West Virginia which is Wal-Mart.

Many of the concerns that current members of our Association have pertain to the annual review of financial eligibility. We commented on much of that in Rule 18.

We were unsuccessful in our effort to persuade staff to recede from some of the positions that it had taken earlier in Rule 18 that ultimately were adopted.

It is a tough, tight credit market. That should be no surprise to anyone. And the issues of credit and securing that obligation under the workers' compensation law are again as sensitive as it was formerly. Prior to 9/11 there were some self-insurers who found that in the national bond market there simply wasn't much interest on the part of national companies selling bonds to cover workers' compensation liabilities. Certainly those competing in West Virginia found that to be the case and so alternative forms of securities had to be identified. Frequently letters of credit were the way self-insurers utilized commercial options to meet the security requirement that is a component of the law. Certainly an important component of the law; a very necessary component of the law provides protection in case there is a self-insured default.

Part of the problem currently is that the cost of credit has gone up dramatically. I understand that this may be an issue that corporations have to face virtually everywhere. And I understand that people who have a regulatory job to do have other priorities than to worry about how much it may cost some company to meet its security obligations because of things at the national level that are way out of the experience of any individual company, and certainly not caused by any individual company here.

Rule 19 has two specific funds that were created in the 2005 legislation. The actual rule concept preceded the statutory authority. I think you should understand that. There was a great deal of dialogue with the leadership of the former Workers' Compensation on how do we deal with security issues when we have a mixed universe of self-insurers, including some who have poor financial performance. I can't remember. . .certainly Ms. Shepherd may remember or somebody else, but I think there were 27 United States steel corporations that went into bankruptcy within the last decade. Some like Bethlehem Steel, which was so critical to the United States and the war effort in Second World War, is out of existence. It's always kind of a sobering thing to evaluate issues like that. But certainly steel, coal when it was in a down cycle – thank goodness it's not now – and other types of industries were particularly vulnerable. The largest self-insured collapse that we've seen in West Virginia – it was by a very large corporation that government allowed the self-insured, and really it was more out of a political decision to allow it to be self-insured. The former Weirton Steel Corporation was an employee ESOP, probably would not have been able to pass any annual review if they had been performed and acted upon then. But government, most of our state's executives, always intervened because the issue was tied to the cost of doing business and preservation of jobs. Perfectly understandable political intervention – perfectly horrible outcome.

And so I am sensitive, as I stand before you, to urge you to think about moving away from what we characterize as the rigidity of this rule and the interplay with Rule 18, and an invitation to help us look at alternatives that might make corporations who are self-insured in West Virginia meet their obligations responsibly, but not become uncompetitive or not find themselves in a situation where West Virginia is simply less attractive than other self-insured landscapes.

In the comments that are filed, not only on behalf of the Self-Insured Association but also on behalf of the West Virginia Chamber of Commerce, the first thing that was noted is a question of why staff wants to amend the definition of "employer default" by making a failure to maintain adequate security a "default." As I indicated, we always reel defensively anytime a regulator says, "If you fail to do this you are in default." Mary Jane [Pickens] and I had some emotional discussions in the early part of this year when the Legislature was to be asked to consider a draft of legislation that would have resulted in self-insured default for failure to deliver a benefit. Those concepts were one of the few things that the prior agency handled appropriately, with due process consideration, and ultimately staff agreed. And so this notion of pulling the trigger and putting somebody in default has extraordinarily legal significance.

First and foremost the defaulting employer loses its benefits and protections under the Workers' Compensation Act. You have to pay all benefits that you are legally required to do if you go into default. You may be sued for any negligent injury ostensibly caused by the employer. There are no affirmative defenses available. That means if it is a co-worker's action that led to the injury and not the employer's direct action, there is no way to assert in court affirmatively that the injury was not caused by the negligence of the employer but it's a co-worker. That is never relevant in workers' comp as a "no fault protection" for injured employees so long as the injury occurs in the course of and arising out of employment. It is a very big deal any time there is a legal mechanism to strip that protection from employers. Now obviously if an employer doesn't buy mandatory insurance, then that employer is violating the law. If it's intentional, one might even say it's a criminal violation. If it's negligence or whatever, it's at least a recognized violation. That employer will ultimately end up in default. Those employees will take benefits from the Uninsured Fund. That employee is subject to serious penalty. And as the Chair just commented, Series 11 is a pretty tough piece of regulation if you've been on the wrong side of what you are supposed to do as an employer for workers' comp.

And I realize for some it's an easy transfer over to say, "Well, if you don't maintain security, it's just as bad as not paying benefits," or if you don't maintain "adequate security." Well, what is adequate security? It is not defined. As we put in our comments, the Association members that I talked to are concerned that any time you have a rule that says, "Well, if you fail to do something that's adequate." That is so subjective. There is no objective way to measure that.

Again, I don't quarrel and I certainly don't want to in-artfully suggest that we think that anybody is intentionally doing something to make the landscape of self-insurance appear to be less attractive so as to make it more attractive to consider other options. There are no facts that support such an allegation, but I bet I hear it at least once a week from a member that is concerned about rules being interpreted in a way that makes the cost of competing in West Virginia less attractive than competing in our immediate area. Now I don't have data and I can't support that factually. That's what I hear. I don't know if it's accurate, but I have no reason to believe it's inaccurate.

Where are we going with all of this? We have suggested some alternatives that would require you again to deal with Rule 18 – if you accepted them, if staff accepted them – would require us to come back again with Rule 18. One of the alternatives that we have requested is that if a self-insured decides it no longer wants to retain self-insurance, that a loss portfolio transfer be allowed. That would be a transfer of that self-insured liability in exchange or consideration for money paid to an insurance carrier – the exact same thing that the Commissioner has publicly indicated, which would be the agency's ultimate dream on transferring the liability of the Old Fund on a loss portfolio transfer. Things like that have occurred regularly in jurisdictions where they have privatized markets.

Now Rule 18 reflects that self-insurers are always liable. In fact the words are "forever liable." Forever is a very long time. We would obviously need to change that, but there is no impediment in Chapter 23 to doing that. Why do we even make that recommendation? Because members are telling us that compared to self-insurance regulation elsewhere they still feel that they are boxed in – in a very rigid, limited, but serious annual review for financial capability. And that if they choose to terminate, they believe that this ought to be a recognized option.

The other thing the membership has said repeatedly is, "You know we just don't understand this whole notion." The Guaranty Fund is a "cash pool." It was created to be responsible for all liabilities that occurred on or after July 1, 2004. The cash pool concept was put in the 1995 law authorizing the former agency to establish pools if it

chose, and the model urged to the former agency was the Ohio pool concept. In fact the language was taken from the Ohio statute and used in §23-2-9, the opportunity for pools to be created. And we supported that as a self-insured community because of the lack of ease that many of our traditional industries, particularly steel and others, had in finding affordable commercial security. In the end, if employers are to remain self-insured in West Virginia, they certainly have to post what the agency determines is the proper amount of security for their risks. And nobody quarrels with that. It's just that they believe – and they have experienced elsewhere – more flexibility in doing this aspect of the workers' compensation business.

We are urging you to think about joining us in walking down a pathway that does not impact in any negative way on any worker. We are not any alternatives that impact on the ability of any worker to be paid benefits under the Workers' Compensation Act. It is a straight business decision that we believe you may statutorily make in your decisions. Now I realize you've got day jobs, and this agency has got a lot more work to do than regulate workers' comp and I'm not trying to suggest that these other options are easy. But too many members who do business elsewhere have said to us that Rule 18.13's financial review precludes consideration of other factors that should be considered to demonstrate financial worth. Now I'm certainly not an expert in this area and neither am I an accountant. I have strong opinions about the accounting profession that I am sure are no more insulting than the accounting profession has about the legal professional.

It serves no purpose to try to explain or interpret how we got where we are. But the perception of the regulated community is that we have serious minded regulators who are inflexible. And you look at the rules – they don't have much flexibility. And the question is, "Should they?" Let me give you one example. It's probably a poor analogy, but as a workers' comp defense attorney it's one that is easy for me to make.

I have talked to you before about the Occupational Pneumoconiosis Board, and that has nothing to do with security. But one issue that was always a legal debate was whether that Board would be empowered to evaluate a cause of pulmonary impairment in any claimant who was tested and showed evidence of pulmonary impairment. And through the years' case decision and changes in the law allowed for those professionals to address issues of causation, and if they made through the record in each individual case justification for it. What is that justification? Well, they rely on test results, medical records, x-rays, their clinical findings, and then they exercise clinical judgment based on their experience and training. In many ways that is all that we are asking of the agency in the regulation and annual review of the financial matter, that this agency utilize a less

black and white formula in making some of these determinations and factor in the reality that unfortunately the business world isn't all black and white. And financial records aren't always black and white either. Now that's harder – and certainly it's less pleasant – but it also allows for a more balanced result in our judgment.

In closing I would say that this whole process – both the opportunity to be before you on Rule 19 and the other aspects of Rule 19 that you will hear later today with regard to security, the annual review of financial records and a determination on the ongoing ability of a company to meet its obligations – has really grown in its urgency and these are serious issues. They are complex certainly. But the Association members have urged that you keep an open mind about this. We will do our best to discuss this with the staff before the next meeting and then we will be back in front of you at the next meeting as well. If you want to hear more about this from the men and women who actually write the checks and pay the bills, I would be delighted to have some of our members here. Because I know sometimes when you are dealing with issues like this, paid representatives don't carry the credibility that a man or woman working for some of these companies and understanding these financial issues carries when they're talking about the kinds of options that we're urging. I would be happy to address any questions. I realize that I've spoken very generally, but I thank you very much for the opportunity of addressing you publicly on this rule.

Chairman Bayless: Does any member of the staff, after hearing Mr. Bowen's comments, need any clarification? You've seen his written comments. Any questions? Does any member of the public have any questions?

Walter Pellish: I have no questions for Mr. Bowen. But I'm curious as to whether any of the staff has any comments they would care to make about Mr. Bowen's comments.

Ms. Pickens: No. Not at this time. This is a public hearing so it's really a forum for people who wish to share their concerns or views about a rule with the Industrial Council and the Insurance Commissioner's Office. It would be our preference to have the benefit of Margaret's careful transcription and a little bit of time to reflect upon all the comments, both the ones that are received here in the public hearing as well as the written comments and respond in that fashion back to the Industrial Council.

Chairman Bayless: That's fine. I would just say one thing that I heard Mr. Bowen say, is I would worry about the definition of "adequate." I would worry about a void for vagueness if we don't find some way to say, "What is adequate?" I'd have to look at it.

I'm not commenting "yes" or "no" now, but that's one thing the court I think would like to know, "Well, what is adequate?" It's a nebulous word. Does any other member of the staff or the public have anything to say on Series 19?

Industrial Council Meeting
PUBLIC HEARING
Title 85, Series 19, Self Insurance Risk Pools
Offices of the West Virginia Insurance Commissioner
1124 Smith Street, Room 400, Charleston, WV
September 11, 2008

Name	Address	Telephone Number	Group Affiliation	Do you desire to address the Council?	Agenda item to which you desire to speak
Henry Bowen			WVSIA		Rule 19